

December 10, 1981

FINAL REPORT TO THE  
SPEAKER OF THE HOUSE  
BY THE  
SELECT INTERIM COMMITTEE  
STUDYING THE  
PUBLIC DEFENDER PROGRAM

Prepared by:

Richard Waters  
House Research Staff

Submitted by:

Representative Joe Holt, Chairman  
Representative Randy Robb, Vice-Chairman  
Representative Jack Campbell  
Representative Jeff Schaeperkoetter  
Representative William Webster  
Representative Robert Ellis Young

## State Public Defender System

The United States and Missouri Constitutions guarantee legal representation to a person accused of committing a crime. Since the enactment of legislation in 1972, attorneys for persons unable to afford private legal representation have been provided by court appointed counsel or, in some judicial circuits, by public defenders.

In recent years, problems have surfaced in the public defender/appointed counsel program -- time demands, reimbursement delays and inadequate fees cause private attorneys to refuse or be reluctant to accept appointments; inadequate salary levels result in experienced public defenders leaving the system after a short time; allegations are made that ineligible persons are being furnished legal representation at public expense by the program; and in circuits served by a public defender, conflict of interest appointments of private attorneys drain the appointed counsel appropriation.

In part these problems stem from the program being painted into a legislative corner. Since the existing statutes prescribe the location of public defenders, number and type of assistants and the salary structure, there is no flexibility to allow an "in-house" solution to provide help for a public defender office which becomes overburdened with cases, which cannot handle a case because of a conflict of interest and which is in a never ending state of flux because experienced public defenders are lured away due to higher salaries and better working conditions; thus the burden shifts to the private bar.

The House special interim committee studying the public defender/appointed counsel program, after holding hearings (see Appendix A) jointly with a similarly convened Senate committee and receiving input from numerous witnesses (see Appendix B), has prefiled legislation, House Bill 1169, which it believes addresses the needs of legal representation for indigent persons while remaining cost effective.

#### ORGANIZATIONAL STRUCTURE

The present public defender program runs in spite of itself. The program is managed by a seven member commission with staff assistance provided by the office of state courts administrator. Yet, as dedicated and conscientious as these people are, their main vocation is not the public defender program.

The committee proposes that a public defender program director be placed under the authority of the commission. Except for additional duties inherent in a new system, the duties and responsibilities imposed on the director and his deputies are now being performed either by the chairman of the commission on a part-time basis or by the staff of the state courts administrator to the detriment of other duties or after normal working hours. The director would administer and coordinate the operation of the public defender system, except he would be unable to direct the legal defense provided by any attorney. He would be the person responsible for seeing that the system worked on a day-to-day basis. However, the hiring of public defenders would still be done by the commission.

Any obligation of staff support provided by the office of state courts administrator to the commission would be eliminated. The public defender program has to stand on its own. This present

arrangement of hiding one program within another is not a good system of either managerial or fiscal accountability.

#### WHO IS TO PROVIDE THE SERVICE

If there is a culprit in the delivery of indigent legal representation, it is appointed counsel costs. Since no one can predict the crime rate and thus the needed number of appointed attorneys, the state's obligation for appointed attorney costs cannot be accurately predicted or budgeted. While such costs remain open-ended, the appropriation must be closed-ended.

Furthermore, crime is not predictable upon one variable. Although credence can be given to population, such factors as the presence or absence of mental hospitals, recreation areas and prisons may determine whether the state public defender system will be called upon in one geographic area to represent a greater number of indigent clients than in another area.

The committee's proposal would eliminate as much as possible the use of appointed counsel. In its stead, the committee would give the commission the flexibility to cover the entire state either by a circuit or a regional public defender or by contracting with private attorneys to provide legal representation for indigents. The committee believes that the commission has developed a "feel" for the needs of the varying areas of the state. It is preferable to allow the commission to determine what means, whether regional or circuit public defender or contract attorney, will provide the best level of defender service which can be modified as the need arises in the most economic manner.

TO WHOM IS THE SERVICE TO BE PROVIDED

The state program which provides or "gives away free" the commodity of legal services is not popular. Most private citizens and elected officials would probably conclude that money spent on public defender services could be better used elsewhere. Yet, the right to legal counsel to best prepare a legal defense or protect a right when accused of a crime is mandated by the state and federal constitutions. Some individuals in our society cannot afford to purchase the services of a private attorney. As a matter of policy, the State of Missouri has decreed that it will provide legal representation for those persons who cannot afford it.

A problem lies in identifying those persons who are eligible to receive the services of the public defender system. For example, the committee inquired whether the ability to post a bond can somehow be the basis for determining indigency. The response was that it can be a factor but not always determinative. The money for many bonds comes not from the resources of arrested individuals but from family or friends who can accumulate enough money to get the person out of jail but not necessarily to hire an attorney.

The broad recommendation for determining eligibility for representation would be "...when it appears from all the facts and circumstances of the case including [a person's] ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf and is indigent...." Within the parameter of that recommendation the commission could further refine, through guidelines, the definition of indigency. Any such guidelines would have to be expanded or

contracted annually to conform to available appropriations.

The actual comparing of a person claiming indigency against the statutory and commission guidelines would be performed by the personnel, either the public defender or person serving under him, of the state public defender system. In some states the determination of a person's indigency, with background and credit checks, is the most complex proceeding in the entire process. In other instances, the court's determination of indigency is too cursory, the court being more concerned with moving its docket than determining indigency. In recommending that a defender determine indigency, the committee is equating the procedure with a private attorney discussing fee arrangements with a prospective client before accepting the case.

#### IN WHAT AREAS WILL SERVICES BE PROVIDED

In most areas, such as felony cases and misdemeanor cases where the defendant will be imprisoned, it is obvious that the public defender system should represent the indigent. In what other legal proceedings should public defender services be available?

If it is accepted that the use of appointed counsel should be as much as possible eliminated to get a handle on costs, the public defender system should be required to provide legal representation in every instance in which the statutes or constitutions require that legal representation be provided. For example, attorneys may be appointed under the provisions of chapter 632 relating to involuntary civil commitments. If the public defender system is not available to provide this required representation, the courts are not

going to do without attorney services. The courts will appoint attorneys. Thereby, a dual system would still be operational with all the present dissatisfaction remaining.

#### FUNDING

At present, the public defender program, as an indication of its unpopularity, is the only state program with a funding ceiling established by statute which the annual appropriation cannot exceed. The cap was \$1.8 million in 1972, increased to \$2.8 million in 1976, increased to \$3.5 million in 1978 and increased to its present level of \$5 million in 1980.

While the committee would recommend that this ceiling be removed and that the check on expenditures be the normal appropriations process, the cost estimates provided to the committee indicate that, once the carry over bills for paying appointed counsel costs have cleared the system, the program can be operated at or below the \$5 million level.

#### RECOUPMENT

According to the latest records available, FY 1979-80, out of the approximately \$3.4 million appropriated for public defenders and appointed counsel only \$16,091 was recouped pursuant to the existing statutes from defendants represented by the public defender program.

A problem in the current statutory recovery provisions is that recoupment occurs after the case is concluded. "After the fact" is the worse possible time to instigate any recovery because, first, the defendant may have lost the case and does not want to pay for a losing effort, or second, defenders have more immediate problems in other cases with new defendants.

The committee's recommendation would stress recoupment at the beginning, during and after representation by the public defender system. In the jail, along with his notification of right to counsel, would be posted notification that if provided legal representation by the public defender system he may be liable for all or part of the cost of representation. Inquiry can be made into financial resources at any stage of the proceedings. The cost of representation can become a judgment lien against him enforceable by the prosecuting attorney. Repayment of representation costs may be imposed as a condition of probation. As an inducement for recoupment, the committee's proposal would allow one-half of the money recouped to stay within the public defender system through deposits in a state treasury revolving fund.

However, even though recoupment is stressed it is not believed that the program will be self-supporting. The program will always be dependent upon general revenue appropriations.

#### EFFECTIVE DATE

The committee's proposal has an effective date of April 1, 1982. This is to emphasize the need for the immediate passage of the legislation. The state courts administrator's office and the House Appropriation Staff project that delay in implementing the measure will impose additional appointed counsel costs of from \$400,000 to \$600,000.

## APPENDIX A

### MEETINGS CONDUCTED

#### ORGANIZATION MEETING/PUBLIC HEARING

Thursday, July 30, 1981  
11:00 a.m.  
Hearing Room 5, Capitol Basement  
Jefferson City, Missouri

#### PUBLIC HEARINGS

Wednesday, September 23, 1981  
10:00 a.m.  
State Office Building, Room 583  
615 East 13th Street  
Kansas City, Missouri

Wednesday, October 7, 1981  
10:00 a.m.  
Wainright State Office Building, Room 116  
111 N. 7th Street  
St. Louis, Missouri

Thursday, November 5, 1981  
10:00 a.m.  
City Hall, Room 315  
830 Booneville Avenue  
Springfield, Missouri

#### WORK SESSIONS / EXECUTIVE MEETINGS

Friday, November 6, 1981  
10:00 a.m.  
Hearing Room 5, Capitol Basement  
Jefferson City, Missouri

Tuesday, November 17, 1981  
Upon noon adjournment  
Room 131, Fiscal Affairs Hearing Room  
Capitol Building  
Jefferson City, Missouri

Tuesday, November 17, 1981  
Upon evening adjournment  
Room 131, Fiscal Affairs Hearing Room  
Capitol Building  
Jefferson City, Missouri

APPENDIX B

WITNESSES

Burton Shostak  
Chairman  
Public Defender Commission

Will Bunch  
Vice-chairman  
Public Defender Commission

Judge John Bardgett  
Supreme Court of Missouri

James Antonio  
State Auditor of Missouri

William Abrams  
Office of the State Courts Administrator

Lorri Shurtleff  
Office of the State Courts Administrator

Howard Eisenberg  
Executive Director  
National Legal Aid and Defender Association  
Washington, D.C.

Judge Paul Vardeman  
16th Judicial Circuit (Jackson County)

Judge Bob Berry  
16th Judicial Circuit

Judge Gene Martin  
16th Judicial Circuit

Judge Bill Peters  
16th Judicial Circuit

Judge William Mauer  
16th Judicial Circuit

Judge Jim May  
16th Judicial Circuit

Judge Carl Gaertner  
22nd Judicial Circuit (St. Louis City)

Judge Brendon Ryan  
22nd Judicial Circuit

Judge James Keet  
31st Judicial Circuit (Greene County)

Judge George Donegan  
31st Judicial Circuit

James McDaniel  
President  
Missouri Bar Association

Judge Orville Richardson  
Chairman, Missouri Bar Committee  
Reviewing the Public Defender Program  
Missouri Bar Association

Anthony Sestric  
President  
Bar Association of Metropolitan St. Louis

Sandra Holman  
Mound City Bar Association

William Dalton  
President  
Greene County Bar Association

Al Reeder  
Jackson County Prosecutor

Joyce Armstrong  
American Civil Liberties Union  
Eastern Missouri

William Shaw  
Public Defender  
21st Judicial Circuit (St. Louis County)

Tim Braun  
Public Defender  
11th Judicial Circuit (St. Charles, Lincoln and Pike Counties)

Joe Downey  
Public Defender  
22nd Judicial Circuit (St. Louis)

David Robards  
Public Defender  
29th Judicial Circuit (Jasper County)

Jim Fletcher  
Public Defender  
16th Judicial Circuit (Jackson County)

Donald Wolff  
Attorney  
St. Louis

David Godfrey  
Attorney  
St. Louis

Bruce Hodack  
Attorney  
Kansas City

J. Patrick Wheeler  
Attorney  
Canton, Missouri

Dwight Douglas  
Attorney  
Neosho, Missouri

Nolen Barry  
Attorney  
Neosho, Missouri

Douglas Kays  
Attorney  
Springfield, Missouri

Steve Price  
House Appropriations Staff

Jim Resch  
Senior District Supervisor, Kansas City Division  
Probation and Parole